Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

APRIL TERM, 1995

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents;

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI
VOLUME III OF IV

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except to the extent that the movants, other than Mr. Sheridan and the Tice plaintiffs, shall be permitted to intervene as "intervenor-objectors" solely for purposes of preserving their rights to appeal any judgment entered by the court in connection with the Stipulation and Settlement Agreement. However, none of the movants shall be considered named "plaintiffs" under the terms of the Stipulation and Settlement Agreement, none of the complaints in intervention shall be filed, and the named parties need not answer or otherwise respond to any of the complaints in intervention. White, 822 F.Supp. P 8.1, at 1432 (citations and footnotes omitted).

8.3 Accordingly, the court rejects those arguments concerning the motions to intervene, and reaffirms its determination that the named plaintiffs and class counsel adequately represent the entire class. See supra s II; White, 822 F.Supp. PP 2.12-2.21, at 1404-07.

IX. DEFENDANTS' MOTIONS TO ENJOIN OTHER ACTIONS

9.1 The court incorporates all of the findings set forth in its order of April 30, 1993, with respect to all matters involving defendants' motions to enjoin various other actions. Id. s IX, at 1433-35.

X. THE MOTION FOR FURTHER FACTUAL FINDINGS CONCERNING THE APPLICATION OF THE NONSTATUTORY LABOR EXEMPTION AND THE FORMATION OF THE NFLPA AS THE EXCLUSIVE

COLLECTIVE BARGAINING REPRESENTATIVE OF THE NFL PLAYERS

In its order of April 30, 1993, the court made the following findings concerning the NFLPA: [FN83]

FN83. See White, 822 F.Supp. PP 10.1-10.6, at 1435.

10.1 On January 6, 1993, the parties reached an agreement in principle to settle the present class action, as well as various other related litigation.

10.2 After an agreement in principle was reached on January 6, 1993, and after a vote of the Board of the NFLPA to seek to become the collective bargaining representative for the players, the NFLPA began to collect authorization cards from NFL players designating it as the exclusive collective bargaining representative of all present and future NFL players.

10.3 By letter dated March 23, 1993, Richard A. Berthelsen, General Counsel of the NFLPA, informed Commissioner Paul Tagliabue that "[a] majority of the players on 1992 season-ending rosters have now signed cards authorizing the NFLPA to represent them for the purposes of collective bargaining."

10.4 In accordance with an agreement between the NFLPA and the NFL, dated March 24, 1993, the American Arbitration Association conducted a check-off of signed cards of interest against the 1992 season-ending rosters. By

letter of March 26, 1993, the American Arbitration Association reported that 873 cards had been duly executed and returned by eligible voters, thus reestablishing the majority standing of the NFLPA.

10.5 Based upon the evidence verified by the American Arbitration Association that a majority of NFL players have recognized the NFLPA as their exclusive bargaining representative, the NFL voluntarily recognized the NFLPA as the sole and exclusive collective bargaining representative of present and future employee players in the NFL, as set forth in the previous NLRB Certification # 18-RC-8308, dated January 22, 1971. (See Letter from Harold Henderson, Executive Vice President for Labor Relations and Chairman of the NFL Management Council, to Eugene Upshaw, Executive Director of the NFLPA, dated March 29, 1993).

10.6 Based on the representations and sworn testimony of the parties, it appears that at all times during this process, the NFLPA maintained that it would not accept any assistance from either the NFL, or any of its member clubs. Nor did the NFL, or any of its member clubs, take any action which either hindered or supported the formation of the NFLPA as the exclusive collective bargaining representative of all present and future NFL players.

10.7 Relying on the foregoing, the court reached the following conclusions concerning the NFLPA in the April 30, 1993 order: [FN84]

FN84. See White, 822 F.Supp. P 10.7, 1435-36.

(a) The NFLPA has been lawfully formed and selected by the players to serve as the exclusive collective bargaining representative of all present and future NFL players. (b) Neither the NFL nor any of its members have taken any action which in any way hindered or supported the formation of the NFLPA as the exclusive collective bargaining representative of all present and future NFL players. (c) The NFL and its member clubs have lawfully recognized the NFLPA as the players' exclusive collective bargaining representative. (d) Accordingly, the NFLPA is fully authorized and empowered to enter into a new collective bargaining agreement with the NFL and its member clubs.

10.8 The court incorporates the foregoing findings concerning the NFLPA, and supplements them as follows.

10.9 On March 31, 1993, two days after the NFL officially recognized the NFLPA as the exclusive bargaining representative of all present and future NFL players, representatives of the NFL Management Council and the NFLPA began to meet in an effort to negotiate a new collective bargaining agreement between players and the NFL member clubs. Those meetings continued almost daily until May 6, 1993, at which time the parties reached agreement on the terms of a new collective bargaining agreement.

10.10 Relying on the representations and sworn

testimony of the parties, the court finds that the collective bargaining negotiations encompassed a wide range of matters relating to the terms and conditions of NFL player employment. The new Collective Bargaining Agreement incorporates, almost verbatim, all of the system-related provisions set forth in the Stipulation and Settlement Agreement. However, some of those provisions were modified during the negotiation process. The court concludes that those modifications are strong evidence that the systems-related provisions were the subject of hard bargaining, and are the product of the give-and-take inherent in such negotiations. [FN85]

FN85. As previously discussed, the Settlement Agreement had to be amended to reflect those changes.

The court has previously recognized that, given the long history of acrimony and disagreement between the NFL and its players concerning the player employment rules at issue here, any accord could only have resulted from long and difficult negotiations, conducted in good faith and at arm's length. White, 822 F.Supp. P 6.13, at 1421. The court finds that this determination is equally true in the collective bargaining context, where the representatives of the NFL and NFLPA have expressly agreed to incorporate those systems-related provisions in the new Collective Bargaining Agreement.

10.11 Certain objectors allege that the NFLPA

cannot be deemed the valid collective bargaining representative of the NFL players because it engaged in collective bargaining before it was reconstituted as a union and recognized by the NFL Management Council as the players' collective bargaining representative.

The court previously determined that the NFLPA's participation in the settlement negotiations as a consultant to class counsel was proper. [FN86] Based on the evidence in the record, the court further finds that the parties did not engage in any collective bargaining prior to the NFLPA's reformation as a union, and that the objectors present no credible arguments or evidence to the contrary. See Allen Supp.Decl. PP 4-8; Declaration of James W. Quinn P 9 & Exh. A (July 2, 1993) (hereinafter "Quinn Decl."); Declaration of Harold Henderson PP 3-4 (June 29, 1993). [FN87] The court therefore overrules all such objections.

FN86. This court, in McNeil, and the Associate General Counsel of the NLRB have both determined that by sponsoring various lawsuits, the NFLPA was not thereby acting as the players' collective bargaining representative. See Powell v. National Football League, 764 F.Supp. 1351 (D.Minn.1991) (in McNeil, rejecting without discussing defendants' claim that the NFLPA continued to function as a union because it was funding various lawsuits); see Defs.' Mem.Opp'n Pls.' Mot.Partial Summ.J. at 10 (Oct. 26, 1990) (raising that contention); Pittsburgh Steelers, Inc., No. 6-CA-23143, 1991 WL 144468 (June 26, 1991).

Accordingly, the court previously concluded that: Where it was appropriate for the NFLPA to finance the prosecution of antitrust litigation challenging terms and conditions of employment, the court finds that the NFLPA's role as consultant to class counsel in settling the same litigation is also lawful and appropriate. White, 822 F.Supp. P 7.23, at 1430-31. The court further concluded that the NFLPA's role in the present class action did not constitute improper inducement to union formation. Id. P 7.24 at 1431; see Shaffer v. Farm Fresh, Inc., 966 F.2d 142 (4th Cir.) (case in which union used litigation as a method by which to organize employees), cert. denied, --- U.S. ----, 113 S.Ct. 657, 121 L.Ed.2d 583 (1992); cf. Pittsburgh Steelers, Inc., No. 6-CA-23143, 1991 WL 144468, at *4 n. 8 (June 26, 1991) (as long as NFLPA's disclaimer of its union status was "otherwise unequivocal and adhered to", it was irrelevant that the disclaimer "was motivated by 'litigation strategy,' i.e., to deprive the NFL of a defense to players' antitrust suits").

FN87. Moreover, the Eagles' assertion that the settlement discussions constitute collective bargaining may be a willful breach of numerous agreements entered into on behalf of all of the NFL defendants, including the Eagles, promising that the NFL defendants would not attempt to mischaracterize any settlement discussions as collective bargaining. See Quinn Decl. PP 2-9, Exhs. A, B & C.

10.12 Having reached agreement on a new collective bargaining agreement, the parties have moved the court, pursuant to the requirements of the Stipulation and Settlement Agreement, [FN88] for findings concerning the applicability of the nonstatutory labor exemption to those terms of the amended Settlement Agreement that have been expressly incorporated in the new Collective Bargaining Agreement.

FN88. See Stipulation and Settlement Agreement art. II, at 19 (original version dated Feb. 26, 1993); Stipulation and Settlement Agreement art. II, at 19 (amended version dated May 6, 1993).

10.13 Various objectors initially opposed such findings, contending that they would constitute an advisory opinion. The court rejected those contentions in its order of April 30, 1993, determining that such findings would not be advisory to the extent that the relevant terms were to be incorporated in a new collective bargaining agreement. White, 822 F.Supp. P 7.25, at 1431. The court noted that a central issue in the present case, as in McNeil and Powell, is the applicability of the nonstatutory labor exemption to various NFL player rules. As part of the compromise of those issues, class counsel specifically agreed that the new rules would be protected by the labor exemption for the express term of any new collective bargaining agreement in which such rules were incorporated, and the Settlement

Agreement reflected that compromise. See Stipulation and Settlement Agreement, art. II, at 19 (original version dated Feb. 26, 1993); Stipulation and Settlement Agreement art. II, at 19 (amended version dated May 6, 1993). The court therefore concluded that it would not be advisory for the court to determine, pursuant to a joint petition by the parties to the Settlement Agreement, that the labor exemption applied to the new player employment rules to the extent that they were incorporated in a new collective bargaining agreement, and for the express term thereof. White, 822 F.Supp. P 7.25, at 1431 (citing Jensen v. United States, 743 F.Supp. 1091, 1103 (D.N.J.1990) (court's decision was not advisory where settlement agreement provided for a judicial determination of the constitutionality of certain agency procedures)).

10.14 Now that a new Collective Bargaining Agreement has been reached incorporating various terms of the amended Settlement Agreement, some objectors reassert those arguments. The requested labor exemption findings will effectuate a primary goal of the present settlement, labor and litigation peace throughout the term of the Settlement Agreement, and will clearly impact both class members and the parties to the Settlement Agreement. Accordingly, the court reaffirms its prior ruling that the labor exemption findings do not constitute an advisory opinion. Cf. City of New York v. Exxon Corp., 697 F.Supp. 677, 681 (S.D.N.Y.1988) (in the context of approving a settlement, court could properly rule on the

application of a provision of CERCLA to the case where that issue "would certainly have a substantial bearing on [non- settling] defendants' litigation strategy").

10.15 The court also reaffirms its determination that the labor exemption findings do not constitute an improper waiver of any class member's rights. White, 822 F.Supp. P 7.26, at 1431 (citing Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991, 1977 WL 1497, at *9 ("[a]ny settlement or consent order would have had to deal with future rules in order to afford appropriate relief to plaintiffs and to be acceptable to the defendants")).

10.16 The court further concludes that, in the present context, findings with respect to the reconstitution and recognition of the NFLPA as the players' union are not within the primary jurisdiction of the NLRB. The nonstatutory labor exemption is a judicially created doctrine, [FN89] and the definition of its scope and application must be made by the federal courts, not the NLRB. In order to determine whether the nonstatutory labor exemption applies to the provisions of the Settlement Agreement that have been incorporated into the new Collective Bargaining Agreement, the court must make preliminary findings that the Collective Bargaining Agreement has been negotiated at arm's length by a valid collective bargaining representative, and that the terms of the agreement are mandatory subjects of collective bargaining. In McNeil, the court held that the nonstatutory labor exemption had ended because the NFLPA was no longer a union, thereby rejecting the NFL's

argument that such a determination could only be made by the NLRB. See Powell, 764 F.Supp. at 1356-57 (holding only in McNeil). The court now finds that the NFLPA has been validly reconstituted as a union as a necessary predicate to its ruling on the applicability of the nonstatutory labor exemption. The court therefore rejects any claims that the findings concerning the nonstatutory labor exemption are within the NLRB's primary jurisdiction.

FN89. See, e.g., Mackey, 543 F.2d at 614 (construing Supreme Court precedent and applying nonstatutory labor exemption to a dispute between players and the NFL concerning the Rozelle Rule); see generally Jonathan S. Shapiro, Note, Warming the Bench: The Nonstatutory Labor Exemption in the National Football League, 61 Fordham L.Rev. 1203, 1205-08 (1993) (discussing the history of the nonstatutory labor exemption and noting that "[t]wo strands of federal labor law are braided into the judicially created nonstatutory exemption: the protection of unions from antitrust actions by the Clayton and Norris-LaGuardia Acts and the congressional policy to promote collective bargaining as expressed in the National Labor Relations Act") (footnotes omitted).

10.17 Based on the foregoing, the court grants the motion for further factual findings concerning the scope of the nonstatutory labor exemption, and makes the following findings.

10.18 Under Mackey, the nonstatutory labor exemption immunizes collectively bargained provisions that: (1) primarily affect the parties to a collective bargaining agreement; (2) concern a mandatory subject of collective bargaining; and (3) are the product of bona fide arm's length bargaining. 543 F.2d at 614. Examining those factors, the court first finds that all of the provisions which are set forth in the amended Settlement Agreement and which have been incorporated in the new Collective Bargaining Agreement, including those relating to the College Draft, the Entering Player Pool, Veteran Free Agency, Franchise and Transition Players, the Final Eight Plan, the Guaranteed League-wide Salary, the Salary Cap and Minimum Team Salary, are provisions that relate to wages, hours, and other terms and conditions of employment. See 29 U.S.C. s 159(a) (1988) (mandatory subjects of collective bargaining concern the "rates of pay, wages, hours of employment, or other conditions of employment"). Similar provisions have routinely been deemed mandatory subjects of collective bargaining affecting primarily the parties to a collective bargaining agreement. See, e.g., Powell, 930 F.2d at 1298-99 (first refusal/compensation system primarily affected only parties in the collective bargaining relationship and concerned a mandatory subject of collective bargaining); Mackey, 543 F.2d at 615-16 (finding that the Rozelle Rule met the first two requirements of the nonstatutory labor exemption test, that is, the Rule primarily affected the parties to a collective

bargaining agreement and was a mandatory subject of collective bargaining); Zimmerman v. National Football League, 632 F.Supp. 398, 403-06 (D.D.C.1986) (applying Mackey test, and finding that supplemental draft was a mandatory subject of collective bargaining which affected primarily the parties to the collective bargaining relationship); cf. Wood v. National Basketball Ass'n, 809 F.2d 954, 962 (2d Cir.1987) (NBA draft and salary cap were mandatory subjects of collective bargaining affecting primarily the parties to the collective bargaining relationship). The court further concludes that the undisputed evidence, including the affidavits and declarations of the principals involved in negotiating the new Collective Bargaining Agreement, demonstrates that the provisions are the product of bona fide arm's length negotiations.

10.19 Accordingly, the court makes the following additional findings: (a) Those provisions of the new Collective Bargaining Agreement which embody all or a portion of the terms of the amended Settlement Agreement were bargained for in good faith. (b) Those provisions are mandatory subjects of collective bargaining and affect primarily the parties to the Collective Bargaining Agreement. (c) Adherence to those terms of the Collective Bargaining Agreement during the express term of the Collective Bargaining Agreement is protected by the nonstatutory labor exemption to the antitrust laws. (d) The application, if any, of the nonstatutory labor exemption

following expiration of the express term of the Collective Bargaining Agreement will be determined in accordance with Article XVIII, Paragraph 5 of the amended Settlement Agreement.

XI. THE COURT HAS JURISDICTION OVER THE WHITE CLASS

11.1 Various objectors again dispute the court's exercise of jurisdiction over absent, nonresident class members. The court overrules those objections, and reaffirms its prior determination that it has appropriate jurisdiction to properly adjudicate the claims of all class members, including those of absent, nonresident class members.

11.2 In making this determination, the court relies on its findings that the White settlement class was properly certified as a mandatory class pursuant to Federal Rule of Civil Procedure 23(b)(1), and that due process does not require that absent class members be provided with a right to opt out of the White class. See supra ss II-III, White, 822 F.Supp. ss II-III, at 1402- 12.

The court further relies on its jurisdiction to enjoin various other actions pursuant to the All-Writs Act, 28 U.S.C. s 1651. [FN90] Id. P 9.3, at 1433-35; see, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183-84, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952) (federal courts have "an ample degree of discretion" in determining how best to administer "multiple litigation in the federal judicial system", and such discretion includes the

power to stay pending federal court actions); In re Joint Eastern & Southern District Asbestos Litig. (Eagle-Picher), 134 F.R.D. 32, 37 (E.D.N.Y. & S.D.N.Y.1990) (under the All-Writs Act, courts have jurisdiction "to certify a national class action and to stay pending federal and state cases brought on behalf of class members"); In re State of South Dakota, 692 F.2d 1158, 1162 n. 8 (8th Cir.1982) ("jurisdictional considerations under the All-Writs Act have been expanded beyond the technical notions of personal and subject matter jurisdiction"); Robertson v. National Basketball Ass'n, 413 F.Supp. 88, 90 (S.D.N.Y.1976) (enjoining separate federal lawsuit filed by an individual class member in order to protect "the jurisdiction of this court to determine this action, either by trial or by court-approved settlement"); cf. In re Baldwin United Corp., 770 F.2d 328, 337 (2d Cir.1985) ("the need to enjoin conflicting ... proceedings arises because the jurisdiction of a multidistrict court is 'analogous to that of a court in an in rem action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts' ") (quotation omitted); Battle v. Liberty Nat'l Life Ins. Co., 877 F.2d 877, 882 (11th Cir.1989) (it "makes sense to consider this case, involving years of litigation and mountains of paperwork, as similar to a res to be administered").

FN90. That Act provides in relevant part that: The Supreme Court and all courts established by Act of

Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C. s 1651(a). In the order of April 30, 1993, that court noted that pursuant to the All- Writs Act: there is ample authority for the proposition that the court has jurisdiction to enjoin other actions even if the parties were not members of the White class. White, 822 F.Supp. P 9.3, at 1434; see, e.g., United States v. New York Tel. Co., 434 U.S. 159, 174, 98 S.Ct. 364, 373, 54 L.Ed.2d 376 (1977) ("[the power conferred by the [All-Writs] . Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order"); In re Baldwin United Corp., 770 F.2d 328, 338 (2d Cir.1985) ("[a]n important feature of the All-Writs Act is its grant of authority to enjoin and bind nonparties to an action when needed to preserve the court's ability to reach and enforce its decision in a case over which it has proper jurisdiction") (citations omitted). The court therefore rejected any claim that the motions to enjoin must be denied because it lacked personal jurisdiction over any party. White, 822 F.Supp. P 9.3, at 1434.

11.3 In its order of April 30, 1993, the court also found that various objectors had: submitted to the court's jurisdiction because they have not confined their arguments to the claim that they are beyond the court's jurisdiction, but

rather have objected to the merits of the proposed settlement. White, 822 F.Supp. P 8.1, at 1432; see Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 787 (5th Cir.1990) (concluding that intervenors had waived any objection to personal jurisdiction when their arguments went "to the heart of the issue before the district court"). [FN91]

FN91. The court therefore denied "their motions to intervene to the extent that those players [sought] to reserve their jurisdictional defenses." Id. P 8.1, at 1432-33.

11.4 Those objectors continue to argue, however, that they have not submitted to the court's jurisdiction. The court reaffirms its determination that it has personal jurisdiction over the following objectors because they have knowingly and voluntarily submitted to this court's jurisdiction: Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson and Jerry Ball. In making this determination, the court relies on the following acts: (1) a personal appearance through counsel at the April 16, 1993, hearing to argue in opposition to the court's approval of the original Stipulation and Settlement Agreement on the merits of that Agreement; [FN92]

FN92. See Transcript of Final Fairness Hearing for the Original Settlement Agreement at 133-34 (Apr. 16,

1993) (argument of counsel that settlement is fundamentally flawed because of inadequate settlement payments to class members); id. at 404-05 (argument of counsel that Franchise Player provisions do "not have to be part of the settlement" and that "[t]here is no justification for disparities" in treatment between named plaintiffs and other class members who had filed suits).

(2) at that same hearing, offering live testimony and cross-examining witnesses concerning the merits of the proposed settlement; [FN93] and

FN93. See Transcript of Final Fairness Hearing for the Original Settlement Agreement at 219-27 (Apr. 16, 1993) (cross examination of class member Steve Jordan concerning merits of case, including fairness of proposed settlement and whether Reggie White adequately represented the class because he got "a deal that was different from a substantial number of the class members"); id. at 281-90 (testimony of objector Sean Jones which challenged fairness of settlement because named plaintiffs were to receive "more money").

(3) the filing of numerous memoranda of law concerning the settlement's purported inadequacies, [FN94] motions to intervene, an expert affidavit setting forth the estimates of their own damages expert, and proposed findings of fact and conclusions of law which clearly

address not only various jurisdictional issues, but also the merits of the proposed settlement. [FN95]

FN94. For example, in a Memorandum Showing Cause Why Certain Cases Should Not Be Enjoined, dated March 18, 1993, those objectors state that they "do challenge the adequacy of the class representatives and the general and specific fairness of the settlement terms." That memorandum does not state that those players were appearing specially, or that they did not submit to this court's jurisdiction.

FN95. For example, in their proposed findings of fact and conclusions of law filed on July 14, 1993, those objectors claim that they have not consented to this court' jurisdiction, but nonetheless raise the following issues: (1) whether the settlement was negotiated in good faith; (2) alleged "conflicts of class counsel, class representative, and the NFLPA"; (3) the alleged inadequacy of representation by the NFLPA and class representatives "because of illegal and unfounded payments" under the settlement; (4) the alleged illegality of the Settlement Agreement because the NFLPA was not certified as the players' collective bargaining agent; and (5) the NFL's alleged interference with the players' right to choose a collective bargaining agent and their right to adequate representation by class representatives by improperly recognizing and negotiating with the NFLPA prior to certification.

See, e.g., Yeldell v. Tutt, 913 F.2d 533, 538-39 (8th Cir.1990) (allegation of jurisdictional defect raised in answer was insufficient to preserve jurisdictional defense where party actively participated in discovery, filed various motions, participated in a five-day trial, and filed post-trial motions); In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 771 (3d Cir.) (noting that in the context of a mandatory class action "a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum") [FN96], cert. denied, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 44 (1989); Network Professionals, Inc. v. Network Int'l Ltd., 146 F.R.D. 179, 184 (D.Minn.1993) (even if defendants had properly raised jurisdictional defense in their answer, they clearly had waived the defense by actively participating in the lawsuit).

FN96. Accordingly, the court rejects the contention that a waiver by active participation in the litigation of the merits should not apply in the context of a mandatory class action. Although subject to mandatory class certification, the foregoing players were nonetheless free to object solely on jurisdictional grounds or to assert their personal jurisdiction defense by motion. They chose instead to appear and litigate a broad range of issues going to the

merits of the present action. See supra notes 92- 95 (listing various issues concerning the merits of this case raised by those objectors).

11.5 Accordingly, the court concludes that the foregoing players have affirmatively and voluntarily waived any and all of the jurisdictional defenses that they may have had.

XII. THE FILING OF APPEALS OF THE COURT'S ORDER OF APRIL 30, 1993 DOES NOT DIVEST THIS COURT OF JURISDICTION TO ENTERTAIN THE PRESENT MOTIONS

12.1 Various interlocutory appeals were filed from the court's order of April 30, 1993. [FN97] White v. National Football League, slip op. at 3 (D.Minn. June 2, 1993). At the hearing for preliminary approval on June 1, 1993, some of those objectors argued that the notices of interlocutory appeal deprive this court of jurisdiction over the pending matters. [FN98]

FN97. The court never entered judgment on the order of April 30, 1993. Appeals of that order were filed on behalf of: (1) Wilber Marshall; (2) Paul Gruber; (3) Byron Evans; (4) Maurice Hurst and John Fourcade; (5) Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe and Gregory Scales; (6) Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David

Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson; Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever; (7) Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson and Jerry Ball; and (8) the Philadelphia Eagles.

FN98. The order of June 2, 1993 stated that: As a result of the filing of appeals of the court's order of April 30, 1993, various other players object to the court's jurisdiction, specifically Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson, Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever. White, slip op. at 5 n. 5 (June 2, 1993) (citing Letter from Robert A. Brunig to the court dated May 28, 1993).

12.2 Although an appeal generally divests the district court of jurisdiction over the issues appealed, in Board of

Education v. State of Missouri, the Eighth Circuit noted that the rule "is not absolute", and held that the district court properly exercised jurisdiction despite a pending appeal where the case required continuing district court supervision, the district court expressly retained jurisdiction, and new facts had developed requiring action by a district court. 936 F.2d 993, 995-96 (8th Cir.1991); cf. id. at 995 (where order is injunctive in nature, under some circumstances district court may retain jurisdiction to modify terms of injunction despite appeal).

12.3 As previously determined in the order of June 2, 1993, the court finds that the present action is the type of case that requires ongoing court supervision. White, slip op. at 3. In addition, the court has specifically retained "jurisdiction over this action to effectuate and enforce the terms of the injunctions and Stipulation and Settlement Agreement." White, 822 F.Supp. at 1437. The court further concludes that the pending motions have been properly brought pursuant to Federal Rule of Civil Procedure 23 and represent new developments that require action by this court.

Finally, on July 22, 1993, the Eighth Circuit dismissed all appeals from this court's order of April 30, 1993, "for lack of jurisdiction." Marshall et al. v. National Football League, Nos. 93-2475MN, 93-2551MN, 93-2562MN, 93-2563MN, 93-2570MN, 93-2574MN, 93-2578MN & 93-2588MN (consolidated opinion dated July 22, 1993).

12.4 Accordingly, the court concludes that it has jurisdiction to entertain the pending motions, and rejects the jurisdictional arguments premised on the filing of various appeals. See Janousek v. Doyle, 313 F.2d 916, 920-21 (8th Cir.1963) (per curiam) ("an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case") (quotation omitted).

XIII. MOTION FOR SANCTIONS AGAINST THE PHILADELPHIA EAGLES

13.1 In its April 30, 1993 order, the court declined to sanction the Philadelphia Eagles despite its concern over "the Eagles' apparent disregard of the court's order of February 26, 1993, and the implausibility of the objections raised." White, 822 F.Supp. P 7.28, at 1431.

13.2 Plaintiffs again ask the court to sanction the Eagles. Although troubled by the Eagles' actions for the same reasons previously set forth in its order of April 30, 1993, the court denies the motion to sanction the Eagles.

Based on the foregoing, IT IS HEREBY ORDERED that:

1. The motion to amend the Stipulation and Settlement Agreement is granted;

2. The motion to approve the Stipulation and Settlement Agreement, as amended, is granted, and the court grants final approval of the amended version of the Stipulation and Settlement Agreement;

3. The motion for further factual findings is granted; and

4. Plaintiffs' motion to sanction the Philadelphia Eagles is denied.

Reggie WHITE, Michael Buck, Hardy Nickerson, Vann McElroy and Dave Duerson,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE; The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots Limited Partnership; The New Orleans Saints Limited Partnership; New York Football Giants, Inc.; New York Jets Football Club, Inc.; The Philadelphia Eagles Football Club, Inc.; B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers Football Company; The San Francisco Forty-Niners, Ltd.; The Seattle Seahawks, Inc.; Tampa Bay Area NFL Football Club, Inc.;

and Pro-Football, Inc., Defendants.

Civ. No. 4-92-906.

United States District Court,

D. Minnesota,

Fourth Division.

April 30, 1993.

ORDER

DOTY, District Judge.

BACKGROUND

Plaintiffs filed the present antitrust class action on September 21, 1992, less than two weeks after a jury rendered its verdict in McNeil v. National Football League, Civ. No. 4-90-476, 1992 WL 315292 (D.Minn. Sept. 10, 1992) (special verdict). [FN1] The present action, McNeil, and most of the other litigation that the parties seek to resolve by the global settlement referenced herein, challenge various NFL player rules, including the right of first refusal/compensation component of Plan B, the college draft, the NFL Player Contract and the preseason pay rules. For many years, those and other rules have been the source of numerous disputes between players and the NFL. [FN2]

FN1. In McNeil, eight individual football players whose contracts with their National Football League ("NFL") employers expired on February 1, 1990, brought an action alleging that the NFL's right of first

refusal/compensation rules as set forth in Plan B violate Section 1 of the Sherman Act.

FN2. For example, in 1972, several players brought an action that successfully challenged a predecessor of Plan B, the Rozelle Rule. Mackey v. National Football League, 407 F.Supp. 1000 (D.Minn.1975), aff'd in part, rev'd in part, 543 F.2d 606, 610-11 (8th Cir.1976) (although not per se illegal, Rozelle Rule violates rule of reason), cert. dismissed, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); see also Smith v. Pro Football, Inc., 593 F.2d 1173, 1183-89 (D.C.Cir.1978) (NFL draft violates rule of reason); Brown v. Pro Football, Inc., Civ. No. 90-1071, slip op. at 19-23, 1992 WL 88039, at *9- 10 (D.D.C. March 10, 1992) (applying rule of reason, and granting plaintiffs' motion for summary judgment on defendants' antitrust liability for fixing the wages of developmental squad players for the 1989 NFL season); Kapp v. National Football League, 390 F.Supp. 73, 82-83 (N.D.Cal.1974) (NFL draft and Rozelle Rule not justified by rule of reason), judgment aff'd on other grounds, appeal dismissed in relevant part as moot, 586 F.2d 644 (9th Cir.1978), cert. denied, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979); see also infra notes 35 & 36 (listing various player disputes).

The five named plaintiffs [FN3] filed the present case on behalf of themselves and all other past, present, and

future NFL players similarly situated during the period specified in the second amended complaint. [FN4] Defendants are the National Football League and its twenty-eight member clubs. The complaint, which originally sought only injunctive relief, was amended to seek both antitrust injunctive relief and damages stemming from the operation of the right of first refusal rules of Plan B, the college draft, the NFL player contract and the preseason pay rules. The second amended complaint also alleges that defendants illegally fixed players' medical insurance benefits and tortiously interfered with players' prospective contracts. Defendants answered the complaint, denying all of plaintiffs' material allegations and asserting various affirmative defenses and counterclaims.

FN3. Those players are: Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy and Dave Duerson.

FN4. The second amended complaint specifically encompasses: (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final judgment in this action and determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, to the date of final judgment in this action and the determination of any appeal therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team. (Pls.' Second Am. Compl. at 8.)

On October 15, 1992, plaintiffs moved for a preliminary injunction that would have barred defendants from enforcing the right of first refusal/compensation rules of Plan B, or imposing any other player reservation system, on veteran NFL players whose contracts were to expire on February 1, 1993. Defendants opposed that motion, which was still pending when the parties, with the assistance of this court, reached a tentative agreement to settle this action on January 6, 1993. [FN5]

FN5. During the weeks that followed, class counsel and NFL representatives engaged in numerous meetings seeking to produce a final document that would reflect the substance of their agreement. The Stipulation and Settlement Agreement represents the culmination of those negotiations.

By order dated January 6, 1993, as amended and reaffirmed on February 17, 1993, the court certified, for the purposes of settlement, a damages and injunctive relief class pursuant to Federal Rule of Civil Procedure 23(b)(1) consisting of: (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, through the date of final approval of the settlement of this

action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team. See White v. National Football League, Civ. No. 4-92-906, slip op. (D.Minn. Jan. 6, 1993) (entered nunc pro tunc); White v. National Football League, Civ. No. 4-92-906, slip op. (D.Minn. Feb. 17, 1993); Pls.' Second Am.Compl. at 8. Those mandatory class certification orders have provided a vehicle for the settlement of, among other things, all player challenges to the Plan B veteran player reservation rules, the college draft and the preseason pay rules. The settlement is the critical step toward the final resolution of the longstanding dispute between the NFL clubs and their player-employees.

On February 26, 1993, plaintiffs and defendants entered into a Stipulation and Settlement Agreement, which encompasses the terms of the proposed settlement and is designed to bring an end to the present action and a wide range of related litigation. In an order dated February 26, 1993, based on its review of the file, record and proceedings to date, this court preliminarily approved the proposed settlement as fair, reasonable and adequate, specifically finding that: 1. The proposed settlement adequately addresses plaintiffs' predominant claim for relief, namely structural, injunctive relief because it will radically alter the NFL's system of player restraints and provide unprecedented free agency to NFL players. 2. The proposed settlement also adequately addresses plaintiffs' claim for monetary recovery, because it will provide for substantial

payments to be distributed fairly among the named plaintiffs and class members in settlement of their past claims against the NFL and its teams. 3. There are substantial novel and complex legal and factual issues involved in this case, precluding any guarantee as to certainty of outcome. 4. The establishment of damages would be uncertain, difficult, costly, and extremely time-consuming. 5. The establishment of plaintiffs' claims regarding preseason compensation are uncertain and are subject to counterclaims that may substantially affect the likelihood of any recovery. 6. Given the long history of this dispute, the parties are uniquely positioned to assess the overall reasonableness of the proposed settlement. 7. The proposed settlement was the product of good faith bargaining at arm's length between the parties. 8. Class Counsel is adequately representing the interests of the named plaintiffs and all class members. See White v. National Football League, Civ. No. 4-92-906, slip op. at 2-3 (D.Minn. Feb. 26, 1993).

In accordance with Federal Rule of Civil Procedure Rule 23(e), the court ordered plaintiffs, at their own expense, to send written notice by mail to class members. [FN6] The court also ordered plaintiffs to publish a summary notice in USA Today. Those notices, which were approved by the court, described the terms of the proposed settlement and informed all class members that a final approval hearing would be held on April 16, 1993, to determine whether the proposed settlement was fair, reasonable and adequate. The notices also informed class

members that they had a right to submit written objections and to appear at the final approval hearing, in person or by counsel, to be heard in support of, or in opposition to, the settlement, or make any other statement of their position concerning the settlement. See Notice of Class Action Settlement and Summary Notice.

FN6. On March 12, 1993, plaintiffs mailed notice to 4,957 class members who are current or former NFL players. During the week of March 8, 1993, plaintiffs mailed notices to 343 college players who attended the NFL's Rookie Combine this year.

Following a resolution of the Board of the National Football League Players Association (the "NFLPA") to seek to become the collective bargaining representative of NFL players, [FN7] in mid-January 1993, the NFLPA began to collect authorization cards from NFL players designating it as the exclusive collective bargaining representative of NFL players.

FN7. After the Eighth Circuit determined that the nonstatutory labor exemption continues to protect NFL veteran player rules as long as an "ongoing collective bargaining relationship" exists, Powell v. National Football League, 888 F.2d 559, 568 (8th Cir.1989), superseded by, 930 F.2d 1293, 1303 (8th Cir.1989), this court, in its order of May 23, 1991, determined that various actions taken by

the players and the NFLPA resulted in the termination of the NFLPA's "status as a labor organization." Powell and McNeil v. National Football League, 764 F.Supp. 1351, 1356 (D.Minn.1991) (holding only in McNeil). On June 12, 1991, the Eighth Circuit denied defendants' motion for interlocutory appeal on that ruling. McNeil, No. 91-8088 (8th Cir. June 12, 1991). The NFL defendants still maintain that the NFLPA has never ceased to function as the players' bargaining representative and thus the nonstatutory labor exemption has never ended.

By letter dated March 23, 1993, the NFLPA informed the NFL that: [a] majority of the players on 1992 season-ending rosters have now signed cards authorizing the NFLPA to represent them for purposes of collective bargaining. (Letter from Richard A. Berthelsen to Paul Tagliabue dated March 23, 1993.) After confirmation of the authenticity of the cards by an independent entity, the American Arbitration Association, the NFL voluntarily recognized the NFLPA as the exclusive collective bargaining representative of the NFL players. (Letter from Harold Henderson to Eugene Upshaw dated March 29, 1993.)

Since March 31, 1993, the NFLPA and representatives of the NFL Management Council, the multi-employer bargaining unit of the NFL owners, have been negotiating in an effort to reach a new collective bargaining agreement. [FN8] As of the date of the final

approval hearing, April 16, 1993, those negotiations remained ongoing. [FN9]

FN8. The last collective bargaining agreement between players and defendants expired in August 1987.

FN9. As of the date of this order, April 30, 1993, the NFLPA and the NFL Management Council had not yet reached agreement on a collective bargaining agreement.

This case is presently before the court on the motion of the parties for final approval of the Stipulation and Settlement Agreement, which fundamentally revises many of the employment practices at issue in this litigation. The five representative plaintiffs (all of whom are active or former NFL players), class counsel, representatives of the NFLPA, and at least twenty-eight of the twenty- nine defendants [FN10] view the proposed settlement as a fair, reasonable and adequate method of resolving this litigation. All of those parties believe that the proposed settlement advances and protects the interests of all class members, and provides the framework for labor peace within the NFL after almost six years of strife.

FN10. As discussed more fully infra, see Section VII(B), the Philadelphia Eagles object to the NFL's recognition of the NFLPA as a labor union and to any potential settlement of a related dispute over licensing

agreements, NFLPA v. NFL Properties, No. 90-CV-4244 (S.D.N.Y.) (filed June 25, 1990).

The court has an extensive record on which to evaluate the fairness, reasonableness and adequacy of the proposed settlement. In addition to voluminous submissions made by the parties in support of preliminary and final approval of the proposed settlement, the court has extensive knowledge of the issues involved in this litigation as a result of more than five years of experience presiding over the present action and its predecessors. In addition to the record in the present action, the court has full access to, and intimate familiarity with, the records in Powell, McNeil, Five Smiths v. National Football League, 788 F.Supp. 1042 (D.Minn.1992), National Football League v. National Football League Players Ass'n & Hilton, Civ. No. 4-91-877 (D.Minn. filed Oct. 15, 1991), and Jackson v. National Football League, 802 F.Supp. 226 (D.Minn.1992). Of particular help to the court is the record in McNeil, which includes the McNeil trial transcript, comprising more than 8400 pages, and the evidence received in McNeil, which includes over 400 trial exhibits. The testimony and evidence received in the foregoing cases has also been supplemented by arguments of counsel and numerous legal memoranda.

In a total class of well over 5,000 players, seventy-three objections were filed on behalf of active or former NFL players. [FN11] In addition, objections were

filed on behalf of one NFL member club, the Philadelphia Eagles, sixteen college players, [FN12] and one player agent. [FN13]

FN11. As of the deadline for filing objections, April 2, 1993, the following active or former NFL players had filed objections: Wilber Marshall, Paul Gruber, Brian Washington, Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Mike Farr, Pepper Johnson, Don Beebe, Gregory Scales, Gregory J. Baty, Barry Sanders, Luis Sharpe, Steve Atwater, Horatio Benny Blades, James Hasty, Byron Evans, Michael C. Johnson, Reggie Langhorne, Maurice Hurst, John Fourcade, Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson, Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson, Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, John Elliott, Duane Bickett and Steve Young. Since April 2, 1993, additional objections have been filed on behalf of Brian Blades, Roland James, Pat Carter, Kenneth F. Ruettgers, Jerry Ball, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever. At the hearing, the court granted

all motions to extend time, ruling that all objections filed as of the hearing date, April 16, 1993, would be considered by the court, whether such objections were timely filed or not. The court further ruled that April 16, 1993, was the deadline for objections, and that it would not consider any objections filed after that date. The Tice action, another case involving preseason claims, was originally filed in the District of Columbia, and transferred to this court by order of Judge Royce C. Lamberth dated February 10, 1993. Tice v. National Football League, 812 F.Supp. 255 (D.D.C.1993); Tice, Civ. No. 4-93-166 (D.Minn. transferred Feb. 10, 1993). At the preliminary approval hearing, some of the Tice plaintiffs objected to the settlement of the preseason pay claims within the context of White. Those objections, however, were withdrawn for purposes of final approval of the settlement, although a few players have filed individual objections to the settlement of the preseason pay within the scope of the White class action. See, e.g., Letter of Gregory J. Baty dated March 31, 1993 ("the Tice case regarding preseason pay claims should not have been included in any Reggie White settlement").

FN12. One college player, Brian Pressler, filed a timely objection, purportedly on behalf of himself and all other present and future "college and other football players" similarly situated. Untimely objections were filed on behalf of college players Jesse Becton, Scott Brown, Rudy

Thompson, Ernie Lewis, Eugene Brown, Percy Coleman, James Chinn, Ron Alexander, Brad LaCombe, Dan Purcell, Steve Ross, Ron Moran, Steve Robinson, Garrett Washington and Bennie Hargro.

FN13. Robert J. Sheridan, who represents the sixteen college player- objectors, filed the objection purportedly on behalf of himself, and all other present and future agents and attorney-agents similarly situated.

The court's evaluation of the proposed settlement must necessarily proceed in light of the McNeil jury verdict. Following a ten-week trial, from June 15 to September 10, 1992, the jury returned its special verdict, finding that the Plan B right of first refusal/compensation rules (1) had "a substantially harmful effect on competition in the relevant market for the services of professional football players"; (2) "significantly contribute[d] to competitive balance in the NFL"; and (3) were "more restrictive than reasonably necessary to achieve ... competitive balance." See McNeil v. National Football League, Civ. No. 4-90-476, 1992 WL 315292, at *1 (D.Minn. Sept. 10, 1992) (special verdict form). Although the jury found that all plaintiffs had suffered antitrust injury, it awarded damages to only four of the eight plaintiffs in the total amount of $543,000, before trebling. [FN14] See id.

FN14. The jury awarded the following damages

before trebling: Mark Collins, $178,000; Don Majkowski, $0; Tim McDonald, $0; Freeman McNeil, $0; Frank Minnifield, $50,000; Niko Noga, $0; Dave Richards, $240,000; and Lee Rouson, $75,000. See id. at *2.

Because the parties reached a tentative agreement to settle the present litigation before the court entered final judgment in McNeil, defendants were unable to file an appeal. [FN15] Thus, neither the liability nor damages issues in McNeil have been finally resolved.

FN15. By order dated November 11, 1992, the court stayed entry of the McNeil judgment pending resolution of various post-trial motions and any appeal. At the time the tentative settlement was reached, various post- trial motions were still pending in McNeil.

Defendants believe that an appeal of the McNeil verdict would present complex and unsettled questions regarding the NFL's antitrust liability arising from the operation of Plan B including, among other things, the scope of the nonstatutory labor exemption, the application of the rule of reason under Section 1 of the Sherman Act, [FN16] and the court's instructions regarding burden of proof and antitrust injury. Although plaintiffs disagree with defendants' position, the court notes that the foregoing issues are complex and difficult, and thus present significant issues for appellate review. [FN17]

FN16. See McNeil v. National Football League, 790 F.Supp. 871, 896-97 (D.Minn.1992) (finding that plaintiffs' Plan B claim should be evaluated under the rule of reason).

FN17. Defendants raised those issues in various post-trial motions on which this court has never ruled, although on January 6, 1993, it was prepared to do so in the event that the parties failed to reach a tentative settlement. The court previously certified the nonstatutory labor exemption issue to the Eighth Circuit in McNeil, finding that there exists a "substantial ground for difference of opinion". Powell and McNeil, 764 F.Supp. at 1359 (holding only in McNeil); compare e.g., Powell, 930 F.2d at 1304 (nonstatutory labor exemption applies as long as the "labor relationship continues"); with e.g., Brown v. Pro Football, Inc., 782 F.Supp. 125, 130-33 (D.D.C.1991) (rejecting Eighth Circuit's holding in Powell, and finding that exemption ends when collective bargaining agreement expires); see Bridgeman v. National Basketball Ass'n, 675 F.Supp. 960, 964-67 (D.N.J.1987) (rejecting both expiration of collective bargaining agreement and negotiating impasse as point at which exemption terminates, and finding that the exemption continues as long as the employer "reasonably believes that the challenged practice or a close variant of it will be incorporated in the next collective bargaining agreement").

The nature and extent of damages that plaintiffs or

other class members might recover as a result of the operation of Plan B would also be subject to significant uncertainties. In McNeil, the only Plan B case tried to date, the jury made clear that such damages are difficult to prove, awarding monetary damages to only four of the eight plaintiffs despite the fact that it found all eight had suffered economic injury as a result of the Plan B rules. McNeil, 1992 WL 315292, at *1-2; see also Jackson v. National Football League, 802 F.Supp. 226, 231 (D.Minn.1992) (many economic injuries alleged by professional football players "may be impossible to quantify in monetary terms", a difficulty "further confirmed by the jury's [verdict] in McNeil "). The court further notes that the McNeil plaintiffs proffered substantial evidence to support their damage claims.

Based on the extensive evidence and argument presented during the settlement approval process, as well as the entire records in Powell, McNeil, Five Smiths, Hilton, Jackson and White, the court has been afforded a comprehensive view of the workings of the NFL and the employment practices of its member clubs, the collective bargaining and labor relations history within the NFL, the nature and effects of the right of first refusal/compensation rules and other player-related rules, the terms of the proposed settlement and the nature and likely effect of the proposed NFL player rules.

Against this background, and for the reasons stated below, the court grants the motions for approval of the

Stipulation and Settlement Agreement, overrules all objections to the settlement, grants defendants' motions to enjoin various other cases and denies the motions to intervene except to the extent that various movants shall be permitted to intervene as intervenor- objectors solely for purposes of preserving their right to appeal the judgment entered by this court in connection with the Stipulation and Settlement Agreement.

I. PROPER NOTICE WAS GIVEN TO THE CLASS OF THE PROPOSED CLASS CERTIFICATION AND SETTLEMENT

1.1 The court has evaluated whether the proposed settlement is fair, reasonable and adequate using the two-stage procedure suggested in the Manual for Complex Litigation, s 30.44, at 241-42 (2d ed. 1985). The first stage involved the court's preliminary determination of whether the proposed settlement was "within the range of possible approval," and whether class members should be notified of the terms of the proposed settlement and the date of a final fairness hearing to determine whether the court should grant final approval. On February 26, 1993, the court determined that the proposed settlement fell within the range of possible approval, and thus the class should be notified of its terms and the date on which the court would conduct a final fairness hearing, April 16, 1993.

The second stage of the court's settlement evaluation process involved sending notice to the class, which described the settlement and allowed class members to file

objections to the settlement prior to the final approval hearing. The notice further provided that objectors would have an opportunity to appear and be heard at the final approval hearing.

1.2 As the court previously ruled in its February 26, 1993, order granting preliminary approval, notice of the proposed settlement and of the final approval hearing on April 16, 1993, was proper and adequate as to timing, content and means of transmission. [FN18]

FN18. The court rejects the contention, made by the agent representing the sixteen college players, that the notice mailed by plaintiffs differed substantially from that approved by the court. Other than various format changes, the notices were identical.

1.3 Class members were given extensive and proper court-approved notice of the proposed class certification and settlement. The objectors had an adequate and reasonable opportunity to formulate and present meaningful objections to the proposed settlement. In all, nearly five weeks were available for the preparation and filing of objections between preliminary approval of the proposed settlement on February 26, 1993, and the deadline for filing such objections on April 2, 1993. Some four weeks were available between the publication of the Summary Notice in the March 3, 1993, edition of USA Today, and the deadline for filing objections. Finally, a full three weeks were available for

the preparation and filing of objections between the initial mailing of the Notice of Class Action Settlement on March 12, 1993, and the April 2, 1993 filing deadline. [FN19]

FN19. Moreover, as previously noted, at the final fairness hearing the court ruled that it would consider all objections filed on or before April 16, 1993. In addition, the court contacted all counsel who appeared at that hearing, and permitted them to submit proposed findings by April 23, 1993. The court considered all proposed findings received as of that date, including those filed on behalf of the college player-objectors, the Philadelphia Eagles, Wilber Marshall, the Washington Redskins player-objectors, Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson, Jerry Ball, Maurice Hurst, John Fourcade, Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Mike Farr, Pepper Johnson, Don Beebe, Gregory Scales, Brian Blades and Pat Carter.

1.4 With respect to the formal fairness hearing on April 16, 1993, the following notice was given:

(a) On March 12, 1993, court-approved notice of the April 16, 1993, hearing and summary of the terms of the proposed settlement was mailed by first-class mail, postage prepaid, to all persons whom the parties were able to

determine, through their best efforts, are class members, and with respect to whom the parties have been able to obtain a current or last-known mailing address.

(b) Court-approved Summary Notice of the April 16, 1993, hearing was also published in the March 8, 1993, edition of USA Today, a daily national newspaper, with a circulation of approximately 1,840,000.

1.5 The court finds that the mailed and published notices clearly satisfy both Rule 23 and due process requirements. Overall, approximately 5,300 notices were mailed to potential class members, including 4,957 notices to current or former NFL players, [FN20] and 343 notices to graduating college players who attended the NFL's 1993 Rookie Combine in Indianapolis. [FN21] Of those, a total of 458, or less than ten percent, were returned by the Postal Service as undeliverable. Of the 458 returned notices, 300 were re-mailed to newly located addresses. [FN22] Mailed notice was directed to the current or last- known addresses of 2,507 of the approximately 2,902 class members (almost eighty-seven percent) entitled to money distributions from the settlement fund. In addition to the Notice of Class Action Settlement, each mailed notice also included an estimate of the settlement payment, if any, that the class member was due to receive. See Grunin v. International House of Pancakes, 513 F.2d 114, 121 (8th Cir.) ("individualized notice by mail to the last known address [is] the 'best notice practicable' in a class action contest", quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156,

174-77, 94 S.Ct. 2140, 2151-52, 40 L.Ed.2d 732 (1974)), cert. denied, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975).

FN20. Levine Aff. PP 2-3.

FN21. The court thus rejects Mr. Sheridan's allegation that the NFLPA obstructed notice to college players by refusing to mail out requested copies until March 31, 1993. During the week of March 8, 1993, notices were mailed to 343 top college players who attended the NFL's Rookie Combine in Indianapolis this year. (Berthelsen Supp.Aff. P 22; Quinn Supp.Aff. P 34.) The NFLPA and class counsel promptly mailed notices to all class members who requested a copy. Mr. Sheridan also spent several hours at the NFLPA's offices discussing the terms of the proposed settlement with staff members. (Berthelsen Supp.Aff. P 27.)

FN22. The NFLPA sought to obtain the addresses of all persons whose notices were returned as undeliverable; such efforts included contacting class members' last known representative. (Levine Aff. P 3.)

1.6 The court finds that the mailed and published notices of the April 16, 1993, hearing were reasonably calculated, under all of the circumstances of NFL football, to apprise interested parties of the proposed settlement and

afford them an opportunity to present their objections. See, e.g., Reynolds v. National Football League, 584 F.2d 280, 285 (8th Cir.1978); Grunin, 513 F.2d at 120 ("the mechanics of the notice process are left to the discretion of the court subject to the broad 'reasonableness' standards imposed by due process" (citations omitted)). The mailed and published notices fairly, reasonably and adequately conveyed to class members the requisite information concerning the proposed settlement, and afforded a reasonable time in which class members could formulate and file their objections, if any, to the proposed settlement. [FN23] See id. at 121; cf. 2 Herbert Newberg & Alda Conte, Newberg on Class Actions s 11.57, at 11-140 (3d ed. 1992) ("the period from receipt of notice until the actual settlement hearing is often 30 days or less").

FN23. The court also rejects the contention that notice in the present case was inadequate because it was not identical to that provided in Alexander v. National Football League, 1977-2 Trade Cas. (CCH) P 61,730, 1977 WL 1497 (D.Minn.1977). When affirming the Alexander settlement in Reynolds, the Eighth Circuit determined that: Due process requires that notice of a hearing to review the compromise of a class suit be structured in terms of content in a manner that enables class members rationally to decide whether they should intervene in the settlement proceedings or otherwise make their views known, and if they choose to become actively involved, to have sufficient opportunity to

prepare their position. Reynolds v. National Football League, 584 F.2d at 284 (citations omitted). Applying the Reynolds standard to the notice given in the present case, the court finds that it was sufficient to allow class members to rationally determine whether they should either intervene or otherwise object. Moreover, in Alexander there were "approximately 2,060 class members for whom no accurate mailing addresses were available." 1977-2 Trade Cas. (CCH) P 61,730, at 72,988, 1977 WL 1497, at *7. Thus, the notice in Alexander was arguably inferior to that given in the present action.

1.7 The Eighth Circuit has further noted that "[c]lass members are not expected to rely on the notices as a complete source of settlement information." Grunin, 513 F.2d at 122 (citation omitted). As the notices suggested, class members could, and many did, obtain complete copies of the underlying documents from the court, and obtain further explanation of the proposed settlement from class counsel, the NFLPA, or their own agents or attorneys. See id. at 122 (due process does not require that a copy of the entire proposed settlement agreement be included with the mailed notice).

1.8 Moreover, in addition to the court-ordered notice, the NFLPA and class counsel have provided significant additional notice of the settlement to thousands of class members and their representatives. (Berthelsen Supp.Aff. PP 22-25); see Alexander, 1977-2 Trade Cas.

(CCH) P 61,730, at 72,989, 1977 WL 1497, at *7 (circumstances that increase the effectiveness of published notice to professional football players include "the fact that many class members are represented by agents or attorneys who stay conversant with player-club developments"). Specifically, in early February, the NFLPA mailed information regarding the proposed settlement agreement to 670 player agents who represent approximately ninety-five percent of all NFL players; on March 1, 1993, the NFLPA conducted a seminar concerning the settlement which was attended by approximately 175 of those agents; and on March 9, 1993, the NFLPA mailed all of those agents a copy of the court-ordered notice. (Berthelsen Supp.Aff. P 24.) The NFLPA also conducted numerous meetings with NFL players in which it explained and answered questions concerning the Settlement Agreement. Representatives of the NFLPA have also spoken to hundreds of players and agents on the phone about the proposed settlement. The notice provided directly to class members was thus far broader than that required by the court's order of February 26, 1993.

1.9 Finally, in addition to the notice provided to class members directly by the parties and the NFLPA, the Settlement Agreement has received extensive media coverage, affording class members with substantial additional notice. Immediately after reaching a settlement in principle on January 6, 1993, the parties released a joint press statement setting forth the major points of the parties'

agreement. As a result, over the next few days, virtually every major newspaper in the United States printed extensive descriptions of the proposed settlement. Since then, there have been hundreds of newspaper and magazine articles and television and radio reports discussing the settlement. Over the past three and one-half months, there has been nearly daily coverage reviewing the terms and operation of the Settlement Agreement. In Alexander, the court recognized that such media coverage increases the effectiveness of the formal notice provided by the parties. 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at *7. As evidence of this, the court noted at the final fairness hearing that at least one objector, Wilber Marshall, filed his objection prior to formal notice being mailed or published. [FN24] White, Transcript of Final Fairness Hearing at 14 (Apr. 16, 1993).

FN24. Marshall filed an objection on March 2, 1993.

1.10 Based on the foregoing, and all other evidence before the court, the court finds that pursuant to the requirements of Rule 23 and due process, proper notice of the proposed class certification and terms of the settlement was given to class members.

II. A DEFINABLE CLASS EXISTS THAT SATISFIES THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23(b)(1)

2.1 Federal Rule of Civil Procedure 23(a) explicitly sets forth four prerequisites to class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Two additional implicit requirements of Rule 23(a) are: "(1) the existence of a precisely defined class; and (2) that the class representatives are members of the proposed class." Powell v. National Football League, 711 F.Supp. 959, 966 (D.Minn.1989) (citation omitted); see also In re Worker's Compensation, 130 F.R.D. 99, 103 (D.Minn.1990); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure ss 1760-61 (2d ed. 1986).

2.2 In addition to meeting the requirements of Rule 23(a), the proposed class must also satisfy one of the three subsections of Rule 23(b), specifically that: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability

to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2.3 The requirements for class certification are more readily satisfied in the settlement context than when a class has been proposed for the actual conduct of the litigation. See, e.g., Bowling v. Pfizer, Inc., 143 F.R.D. 141, 157-58 (S.D.Ohio 1992) ("[t]he rationale behind the loosening of the requirements is to encourage sweeping settlements of complex disputes"); In re A.H. Robins, 85 B.R. 373, 378 (Bankr.E.D.Va.1988), aff'd, 880 F.2d 709, 738-40 (4th Cir.), cert. denied, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); see also 2 Herbert Newberg & Alba Conte, Newberg on Class Actions s 11.28, at 11-57 & n. 142 (3d ed. 1992) (citing Robins).

A. Definability

2.4 The court determines that in the present case, a definable settlement class exists consisting of: (1) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987, to the date of final approval of the

settlement of this action; and (2) all college and other football players who have been, are now, or will be eligible to play football as a rookie for an NFL team at any time from August 31, 1987, to the date of final approval of the settlement of this action.

2.5 That class is neither amorphous nor imprecise, and is substantially identical in nature to classes that previously have been certified in cases challenging restraints on competition for player services in professional sports leagues that resulted in analogous class-wide settlements. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,985, 1977 WL 1497, at *2 (D.Minn.1977) (discussing its certification of a class consisting of "all professional football players who have been under contract to one or more NFL clubs at any time from September 17, 1972, to March 1, 1977"), aff'd sub nom. Reynolds v. National Football League, 584 F.2d 280, 283-84 (8th Cir.1978) (in addition to damage claims, noting the broad scope of injunctive relief originally sought in Alexander, although such relief ultimately became unnecessary when a collective bargaining agreement was reached); Bridgeman v. National Basketball Ass'n, Civ. No. 87-4001, slip op. (D.N.J. Apr. 18, 1988); Robertson v. National Basketball Ass'n, 389 F.Supp. 867, 900-01 (S.D.N.Y.1975), aff'd, 556 F.2d 682, 685 (2d Cir.1977).

2.6 The settlement class is well defined and discrete because all individuals who have been under contract or eligible to play for an NFL team as a rookie since August

31, 1987, are readily identifiable by name. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at *7 (citing Robertson, 389 F.Supp. at 897); accord Powell, 711 F.Supp. at 968-69. The court further determines that this prerequisite is not defeated by the inclusion of a well-defined group of players who will enter or become eligible to enter the NFL in the future because the court will be able to determine, at any given time, whether a particular individual is a member of the White class. Robertson, 389 F.Supp. at 896-97 ("the fact that fifty to a hundred more [players] may be joining the class does not make it unmanageable"); cf. Probe v. State Teachers' Retirement Sys., 780 F.2d 776, 780 (9th Cir.) ("[t]he fact that [a mandatory] class includes future members does not render the class definition so vague as to preclude certification" (citation omitted)), cert. denied, 476 U.S. 1170, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986).

B. Representativeness

2.7 The named plaintiffs were all under contract to an NFL team, and subject to the challenged system of player restraints, during the relevant period. Thus, they are all members of the settlement class they seek to represent.

C. Numerosity

2.8 As the settlement class consists of more than 5000 persons who are widely dispersed throughout the United States, joinder is impracticable. Powell, 711 F.Supp. at 969; State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 566 (D.Minn.1968) (requirement met where

"problems of management and administration would be rendered extremely cumbersome and difficult by joinder of all absentee members"); Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at *8.

D. Commonality

2.9 Commonality "does not require that every question of fact or law be common to every member of the class"; rather, the requirement is met where the questions linking the class members are " 'substantially related to the resolution of the litigation even though the individuals are not identically situated.' " Paxton v. Union Nat'l Bank, 688 F.2d 552, 561 (8th Cir.1982) (citations and quotation omitted), cert. denied, 460 U.S. 1083, 103 S.Ct. 1772, 76 L.Ed.2d 345 (1983); Hedge v. Lyng, 689 F.Supp. 884, 889- 90 (D.Minn.1987) (requirement satisfied where the plaintiff challenged the validity of rules that were common to the class). Differences in the amount of monetary recovery to which particular class members may be entitled also do not defeat the propriety of class certification of a settlement class. Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 1977 WL 1497, at *9 ("[u]nder the proposed settlement, members of the class will receive different settlement payments based on certain factors, but this difference in payment will not bar class status"); Robertson, 389 F.Supp. at 898 n. 57 (difference in individual settlement damages will not preclude class certification); cf. Brown v. Pro Football, Inc., 146 F.R.D. 1, 2 (rejecting NFL defendants' motion to decertify a player

class based on defendants' contention that "all that remains is the individualized issue of damages").

2.10 The claims of each member of the settlement class involve common questions of law and fact. Defendants have imposed various rules "in substantially identical manner to all players within the NFL." Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at *8. Thus, each member of the class was, or would have been, subject to the same system of player restraints, which operated to prevent them from freely offering their services to NFL teams in a competitive market. The court therefore determines that the commonality requirement is satisfied. Id.; Powell, 711 F.Supp. at 969; Robertson, 389 F.Supp. at 898.

E. Typicality

2.11 The claims of the named plaintiffs are typical of the claims of the settlement class. The "typicality" requirement is met " 'if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory.' " Paxton, 688 F.2d at 561-62 (quotation omitted); In re Workers' Compensation, 130 F.R.D. at 105. In other words, the named plaintiffs must have the same or similar grievances as the members of the class. Dirks v. Clayton Brokerage Co., 105 F.R.D. 125, 133 (D.Minn.1985) (citing Donaldson v. Pillsbury, 554 F.2d 825, 830 (8th Cir.), cert. denied, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128 (1977)). In the present case, the named plaintiffs and class

members either have been, or would have been, subject to the same system of restraints. Thus, all players have a similar interest in altering that existing system. Robertson, 389 F.Supp. at 898. Moreover, "the complaint alleges no claims peculiar to the named plaintiffs." Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 1977 WL 1497, at *8. The court thus concludes that for settlement purposes, the typicality requirement is met. Id.; Robertson, 389 F.Supp. at 898; cf. Powell, 711 F.Supp. at 969.

F. Adequacy Of Representation

2.12 The purpose of the "adequacy" requirement is to ensure that the class representatives "will vigorously prosecute the interests of the class." Paxton, 688 F.2d at 562-63; In re Workers' Compensation, 130 F.R.D. at 107. The requirement has two elements: (1) that the class representatives and their counsel will competently and vigorously prosecute the lawsuit; and (2) that the interests of the class representatives are not adverse to those of the class members. Paxton, 688 F.2d at 562-63; In re Workers' Compensation, 130 F.R.D. at 107.

2.13 The court first finds that plaintiffs' counsel have the experience and competence to provide adequate representation to all class members, as evidenced by their performance on behalf of player plaintiffs in a number of analogous cases, including Alexander and Robertson, [FN25] as well as Powell, McNeil, Hilton, Jackson and Five Smiths, all of which were before this court. [FN26] See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at

73,006, 1977 WL 1497, at *32 (noting that prior expertise exists to "a remarkable degree" where counsel served as chief attorney in both Mackey and Alexander). [FN27]

FN25. James W. Quinn, class counsel in the present action, as well as counsel in Powell, Five Smiths, Hilton, McNeil and Jackson, was also class counsel in the Robertson litigation.

FN26. The court thus has substantial personal basis on which to judge the experience and competence of class counsel.

FN27. The Alexander court was referring to Edward M. Glennon, who was players' counsel in Mackey, and was instrumental in settling Alexander, the class action arising in the wake of Mackey. Mr. Glennon was also class counsel in Powell, players' counsel in McNeil and Jackson, and class counsel in the present action.

2.14 Several objectors contend, however, that class counsel's loyalty to the class has been compromised as a result of counsel's representation of the NFLPA, as well as individual players, in various other lawsuits. The court concludes, however, that class counsel's participation in other, closely related lawsuits which have been also supported by the NFLPA, does not create any conflict between class counsel and members of the class. In fact,

rather than creating conflict, the experience gained thereby was likely a prerequisite to the parties' ultimate agreement to settle. Moreover, the global nature of the settlement reflects the interrelationship of the players' struggle, which was supported both by individual players and the NFLPA. Indeed, two of those actions, McNeil and Jackson, were crucial to the present class action settlement. [FN28]

FN28. The court notes that class counsel's handling of various related actions, beginning with Powell and continuing through White, has been exemplary.

In the Alexander class action settlement, the court approved a settlement in which class counsel also functioned as counsel to the NFLPA, finding that such representation did not render class counsel inadequate or impair the negotiated settlement of the various class claims. Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 73,002, 1977 WL 1497, at *8, *27 (in approving settlement, noting that NFLPA funded both Alexander and Mackey, and that class counsel also represented the NFLPA).

After presiding over lengthy litigation in which class counsel represented both players and the NFLPA, the court similarly determines that class counsel competently and vigorously represented the interests of both individuals players, as in McNeil and Jackson, and class members, as in Powell and the present action. [FN29]

FN29. In his order of February 10, 1993, transferring the Tice action to this court, Judge Royce C. Lamberth raised various potential concerns regarding class counsel in the present case. Tice v. National Football League, 812 F.Supp. 255 (D.D.C.1993). Class counsel in the present case, however, was only tangentially involved in the Tice litigation. The court determines that those concerns never materialized, relying on: arguments and memoranda submitted at the preliminary hearing, this court's substantial experience with class counsel in the present action, as well as in McNeil, Jackson, Hilton, Five Smiths, and Powell, its determination that class counsel have fairly and adequately represented the entire class, class counsel's termination of its representation of the NFLPA in the licensing litigation, and the withdrawal of plaintiffs and counsel's objections in Tice.

2.15 The NFLPA has paid most of class counsel's fees as they have accrued, and class counsel will not seek recovery from the class settlement fund. (Quinn Aff. P 72; Berthelsen Aff. PP 18-19.) The court therefore rejects any contention that class counsel's interest in recovering attorneys' fees has prevented them from adequately representing the class. Cf. Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250-51 (S.D.Ohio 1991) (approving attorneys' fees of $5,000,000 where class recovery totalled $56,600,000, and noting that "percentages awarded in common fund cases typically range

from 20 to 50 percent of the common fund created").

2.16 Several objectors argue that the class members' interests are adverse because the class is comprised of players in different stages of their careers, contending that there are conflicts between rookies and veterans, and between veterans with different levels of seniority. This, however, is not the type of adversity which precludes class certification. No matter what stage a player is in his career, defendants have imposed various rules "in substantially identical manner to all players within the NFL." Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at * 8. Moreover, players obviously do not remain at the same level of seniority; as their careers progress, they will all be subject to the same series of rules. Thus, all veteran players were at one time rookies subject to the same college draft, and all veteran players have been subject to either the Plan B right of first refusal/compensation rules, or one of its predecessors. Thus, on numerous occasions, courts have certified settlement classes consisting of all players in a particular sports league. Id. at 72,989-92, 1977 WL 1497, at *8-10; Robertson, 389 F.Supp. at 896-903; Powell, 711 F.Supp. at 966-69.

2.17 Moreover, no matter what level of seniority, all class members share a common interest in the form and substance of the NFL's player rules, and all class members share a similar interest in the future of the NFL. Cf. Robertson, 389 F.Supp. at 899 (even former players were concerned about the National Basketball Association's

future). Although the free agency rules set forth in the proposed settlement vary depending on players' seniority, that distinction does not create adverse interests within the class because those rules relate solely to the remedy, not to the subject matter, of the present litigation. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 1977 WL 1497, at *9 (citing Sperry Rand Corp. v. Larson, 554 F.2d 868, 874 (8th Cir.1977)). The court further determines that variations in settlement payments based on various factors, such as the length of time a player was restricted under Plan B, do not preclude class treatment. Id. (approving class settlement where similar point system resulted in differing class settlement amounts); Robertson, 389 F.Supp. at 898 n. 57.

2.18 Various objectors contend that the interests of absent class members have been "sacrificed" in order to secure special benefits for the named plaintiffs. Although the propriety of rewarding named plaintiffs has been "rigorously debated", 2 Herbert Newberg and Alda Conte, Newberg on Class Actions s 11.38, at 11-80 (3d ed. 1992), such "preferential treatment ... must be viewed in the context of [the] litigation." In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 709 (E.D.Mich.1985). The court must examine the settlement "closely to ensure that the named plaintiffs have fairly represented the interests of the class." Luevano v. Campbell, 93 F.R.D. 68, 89 (D.D.C.1981). Courts, however, routinely approve such awards for class representatives who expend special efforts

that redound to the benefit of absent class members. See, e.g., Thornton v. East Texas Motor Freight, 497 F.2d 416, 420 (6th Cir.1974) (approving greater awards for those who took a more active role in seeking class relief); Enterprise Energy Corp., 137 F.R.D. at 250 (approving class representative "incentive awards" where named plaintiffs took steps to protect interests of class members, thereby effectuating "a Settlement that provides substantial economic and non-economic benefits to the Class Members"); In re Jackson Lockdown/MCO Cases, 107 F.R.D. at 710 (approving such award); Luevano, 93 F.R.D. at 89; Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 72,996, 1977 WL 1497, at *9, *17 (distribution of settlement payments based on a point system was "fair and reasonable" and economic interests of named plaintiffs did not conflict with those of absent class members even where "[a]dditional points [we]re awarded to the named plaintiffs"); cf. Huguley v. General Motors Corp., 128 F.R.D. 81, 85 (E.D.Mich.1989) (in case where incentive awards were not objected to, noting that "named plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation they have borne"), aff'd, 925 F.2d 1464 (6th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 304, 116 L.Ed.2d 247 (1991).

Thus, the adequacy of the named plaintiffs' representation is ultimately determined by the terms of the settlement itself. See, e.g., In re Corrugated Container

Antitrust Litig., 643 F.2d 195, 212 (5th Cir.1981) ("[i]t is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting"). In the present case, and in the related actions funded by the NFLPA, the court finds that the named plaintiffs took substantial risks to step forward. See infra P 6.18 & note 45 (detailing defendants' history of retaliating against such players). Many of the named plaintiffs have been involved in litigation for years, and have been deposed or testified at the McNeil trial. [FN30] In light of the comprehensive settlement that has been reached, which will virtually restructure the entire league and has already created and will continue to create substantial benefits for all class members, the court concludes that the interests of the named plaintiffs are neither antagonistic nor adverse to the interests of absent class members, and that the preferential treatment of the named plaintiffs is not excessive, but fair and reasonable under such circumstances. Luevano, 93 F.R.D. at 89.

FN30. Although other named plaintiffs, such as the White and Jackson named plaintiffs, have been involved for a much shorter period of time, at the time that those players stepped forward, there was no way of knowing that a settlement would be reached so soon after their lawsuits were filed. As one witness testified at the final fairness hearing, last summer one member club stated its willingness to litigate for another ten years. White, Transcript of Final

Fairness Hearing at 173 (Apr. 16, 1993) (testimony of Randy Vataha). Absent court intervention, that statement may have proven true.

2.19 Moreover, "in the settlement context ... the adequate representation requirement is satisfied when the court determines that the settlement was negotiated at arm's length and was not collusive in favoring the class representative." 2 Herbert Newberg and Alda Conte, Newberg on Class Actions s 11.28, at 11-59 (3d ed. 1992); cf. Jones v. Amalgamated Warbasse Houses, 97 F.R.D. 355, 359 (E.D.N.Y.1982) (in the absence of evidence of collusion, a "settlement is presumed regular"). After presiding over numerous related cases and participating in the final settlement negotiations in the present action, the court finds that the settlement was clearly negotiated at arm's length and presents no danger of collusion. At least four factors support this finding: the size and complexity of the Agreement and the compromises reflected therein; the context in which it was reached, that is, after five and one-half years of frequently acrimonious litigation; the court's personal knowledge of the negotiators and the tenacity with which they struggled to protect their principals' interests; and the need for the court's involvement in the final stages of the negotiations. See Robertson, 389 F.Supp. at 899 ("[t]he four- year history of this litigation is sufficient indication that the named plaintiffs and their counsel will fairly and adequately protect the

interests of the class"); White, Transcript of Preliminary Approval Hearing at 82-84 (Feb. 26, 1993) (finding no evidence of collusion and concluding settlement was product of arm's length negotiations).

Having determined that the settlement was negotiated in good faith, the court rejects any contention that the preferential treatment of the named plaintiffs jeopardized their ability to adequately represent the class. Luevano, 93 F.R.D. at 90 (approving monetary relief for named plaintiffs in settlement in which only a portion of the class received such relief where "there was no improper collusion").

2.20 Finally, there has been overwhelming class support for the proposed settlement. After extensive notice by mail, by publication and by press coverage of the proceedings, less than two percent of the class members have objected to any phase of the settlement. Out of thousands of class members, only seventy-three active or former players, and sixteen college players, have objected to the proposed class certification and settlement, and most of those objections reflect dissatisfaction with the objectors' personal circumstances. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 1977 WL 1497, at *9 (rejecting claim that named plaintiffs' interests were antagonistic based on overwhelming support by absent class members); cf. Van Horn v. Trickey, 840 F.2d 604, 606 (8th Cir.1988) ("a settlement may be approved over a significant percentage of objections from class members" (citation omitted)).

2.21 Based on the foregoing, the court concludes that: none of the objectors has introduced any evidence to establish that alleged potential conflicts within the class, or between the named plaintiffs and the absent class members, are real possibilities rather than imaginative speculation. Class action status will not be denied, nor will subclasses be required, absent such a showing. Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991; 1977 WL 1497, at * 9 (citing Robertson, 389 F.Supp. at 899). The court thus finds that the named representatives adequately represent the class, and denies any request to decertify the class, to form subclasses or to appoint other named plaintiffs or additional class counsel.

G. The Need To Avoid Separate Actions

2.22 Like Alexander, the court finds that the present dispute could not be settled solely by an agreement to award class members monetary relief for alleged past liability. To be effective, any settlement must also address the NFL "structural" rules that will govern players in future years. Thus, a comprehensive agreement or order must encompass such "future rules in order to afford appropriate relief to plaintiffs and to be acceptable to the defendants." Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991, 1977 WL 1497, at *10.

2.23 As the Eighth Circuit observed when affirming the Alexander settlement: [t]he need to revise or to eliminate past rules and practices of professional football, [particularly veteran player restraints], plainly encompasse[s] the

possibility that adjudications of separate actions could set incompatible standards of conduct for the National Football League. Reynolds, 584 F.2d at 283. If individual players file separate actions seeking injunctive relief against NFL player restraints, there is a substantial risk of inconsistent or varying adjudications which would result in incompatible standards of conduct for the defendants. One court could grant injunctive relief, a second might deny such relief, and a third might grant injunctive relief that materially differs from that granted by the first court. See Robertson, 389 F.Supp. at 901. As the district court observed in Robertson, such: [d]iffering results in the individual actions would impair the [professional sports league's] ability to 'pursue a uniform continuing course of conduct' where pragmatic considerations require that the defendants act in the same manner to all members of the class. Id. (quotation omitted); cf. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 101, 104 S.Ct. 2948, 2960, 82 L.Ed.2d 70 (1984) (college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all"); Reynolds, 584 F.2d at 287 (noting in dicta that "[s]ome leveling and balancing rules appear necessary to keep the various [NFL] teams on a competitive basis").

The near certainty of such inconsistency is borne out by the history of litigation between players and the NFL. For example, in Mackey, the Eighth Circuit determined that the NFL's interest in maintaining competitive balance

between teams should be considered under the rule of reason for purposes of determining whether a veteran player restraint violated the Sherman Act. [FN31] Mackey, 543 F.2d at 619-20. However, in Smith v. Pro Football, Inc., the Court of Appeals for the District of Columbia rejected the competitive balance justification as a matter of law, finding that under the rule of reason, the NFL's interest in maintaining competitive balance, which the NFL argued was a procompetitive effect, could not be balanced against the anticompetitive effects of the college draft. 593 F.2d 1173, 1186 (D.C.Cir.1978); see also Brown v. Pro Football, Inc., Civ. No. 90-1071, slip op. at 19-23, 1992 WL 88039, at *9-10 (D.D.C. March 10, 1992) (applying Smith and refusing to consider competitive balance when determining whether defendants were liable for fixing the wages of developmental squad players for the 1989 NFL season).

FN31. Under rule of reason balancing, the "key issue is thus whether [the veteran player restraint] is essential to the maintenance of competitive balance, and is no more restrictive than necessary." Mackey, 543 F.2d at 621.

The near certainty of incompatible rules of conduct for defendants is further demonstrated by the current inconsistent case law concerning the scope of the nonstatutory labor exemption. In the Powell case, the Eighth Circuit determined that nonstatutory labor exemption

protects defendants as long as the "labor relationship continues", but declined to define at what point such relationship ends. 930 F.2d at 1303. A federal district court in the District of Columbia, however, rejected the Eighth Circuit's ruling in Powell, and found that the exemption ends when the parties' collective bargaining agreement expires. Brown v. Pro Football, Inc., 782 F.Supp. 125, 129-33 (D.D.C.1991); cf. Bridgeman v. National Basketball Ass'n, 675 F.Supp. 960, 964-67 (D.N.J.1987) (rejecting both expiration of collective bargaining agreement and negotiating impasse as point at which exemption terminates, and finding that the exemption continues as long as the employer "reasonably believes that the challenged practice or a close variant of it will be incorporated in the next collective bargaining agreement").

Based on the foregoing, the court concludes that class certification is appropriate under Rule 23(b)(1)(A). See Reynolds, 584 F.2d at 283 (finding that certification of a 23(b)(1) class is appropriate in cases involving antitrust challenges to a system of player restraints because "[a]ntitrust violations involving the rules and practices governing professional players may require the imposition of broadly based remedies").

The court further concludes that the prosecution of separate actions by individual players would create the risk of judgments that may, as a practical matter, affect the rights of class members and impair their ability to protect their interests. As the court observed in Alexander: such

risks are illustrated by the attempt of one objector to initiate a separate suit challenging the agreed-to structural rules and seeking injunctive relief in another forum. 1977-2 Trade Cas. (CCH) P 61,730, at 72,991, 1977 WL 1497, at *11. The numerous lawsuits already filed by various class members seeking injunctive relief clearly demonstrate that such risks are also present in the instant case. See, e.g., Hurst v. National Football League, Civ. No. 92-3263 (E.D.La. filed Oct. 1, 1992); Sanders v. National Football League, No. 92-4365 (C.D.Cal. filed July 23, 1992). Accordingly, the court determines that certification is also appropriate under Rule 23(b)(1)(B). Powell, 711 F.Supp. at 969; Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991, 1977 WL 1497, at *11; Robertson, 389 F.Supp. at 901.

2.24 Although the present class would also satisfy the requirements for certification under Rule 23(b)(3), the court determines that the class should be certified exclusively under Rule 23(b)(1). As numerous courts have held, when there is a choice between (b)(1) and (b)(3) certification, it is proper to proceed under (b)(1) exclusively in order to further the policies underlying (b)(1) class actions, that is, to avoid inconsistent adjudications or the compromise of class interests which otherwise would occur as a result of class members' ability to opt out under a (b)(3) class. See, e.g., Reynolds, 584 F.2d at 284; Robertson, 556 F.2d at 685; Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 (9th Cir.1976);

Specialty Cabinets & Fixtures v. American Equitable Life Ins. Co., 140 F.R.D. 474, 477 (S.D.Ga.1991); Powell, 711 F.Supp. at 969; Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991-92, 1977 WL 1497, at *11. In such cases, certification of a mandatory class is preferred because: [i]n Rule 23(b)(3) opt-out classes ... absent class members are connected with one another [solely] because their claims involve common questions. By contrast, no opt-out classes satisfying Rule 23(b)(1) or (2) were designed specifically to avoid the risks of inconsistency, prejudice, or inequity that would result to persons similarly situated in the absence of a unitary adjudication of their common claims.... [Thus] the protection of the rights of class members in [no opt-out] classes ... is much more interdependent with resolution of the rights of others similarly situated than is the case for [23(b)(3)] class members.... 1 Herbert Newberg & Alda Conte, Newberg on Class Actions s 1.20, at 1-48 (3d ed. 1992).

In the present action, the claims of class members are not connected solely because they involve common questions, but rather because they arise from a system of player rules that have been uniformly imposed on all professional football players. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at *8 (defendants have imposed various rules "in substantially identical manner to all players within the NFL"). [FN32] The court therefore finds that class certification under Rule 23(b)(1) is more appropriate than under Rule 23(b)(3)

because it effectuates the policies underlying such mandatory class actions.

FN32. As a result of this identity of interest, in McNeil, the court determined that all eight plaintiffs, if injured, suffered from the same antitrust injury, that is, the inability to compete in the relevant market for professional football players' services. See McNeil, Civ. No. 4-90- 476, 1992 WL 315292, at *1 (D.Minn. Sept. 10, 1992) (Question 4 of the special verdict form, which required the jury to determine plaintiffs' economic injury collectively rather than individually); id. at *5 (Jury Instruction No. 29, setting forth antitrust injury alleged by plaintiffs).

2.25 For the foregoing reasons, the court concludes that a definable class exists that satisfies the requirements of, and should be finally certified pursuant to, Federal Rule of Civil Procedure 23(b)(1).

III. DUE PROCESS DOES NOT REQUIRE THAT ABSENT CLASS MEMBERS BE GIVEN OPT-OUT RIGHTS

3.1 Opt-out rights are not required in actions involving classes properly certified pursuant to Rule 23(b)(1). See Fed.R.Civ.P. 23(b)(1), (c)(2).

3.2 A number of objectors have argued that, under the Supreme Court's decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) and its progeny, minimum due process requires that

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 18, 1995, I served the within *Appendix For Petition For Writ of Certiorari (Volume III of IV)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 18, 1995, Los Angeles, California.

Betty J. Malloy
(*Original Signed*)